TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~[illegible]~~ 296.

THE UNITED STATES, APPELLANT,

vs.

EDGAR M. WILSON, ADMINISTRATOR OF THOMAS B. VAN BUREN, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 26, 1897.

(16479.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 700.

THE UNITED STATES, APPELLANT,

vs.

EDGAR M. WILSON, ADMINISTRATOR OF THOMAS B. VAN BUREN, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

THOS. B. VAN BUREN
vs.
THE UNITED STATES. } No. 16090.

I. *Petition. Filed March 30, 1888. J. R.*

The petition of Thomas B. Van Buren respectfully shows that he is a citizen of the United States and of the State of California, and that he is now a resident of San Francisco, which is his post-office address.

I.

That he was consul-general for the United States at Kanagawa, Japan, from June, 1874, until June, 1885.

II.

That during his term of service he collected in fees, which were erroneously credited to the Treasury, a large sum of money, viz, about $50,000, for certifying invoices for goods exported to the United States which were free of duty.

III.

Your petitioner further avers that said fees were paid to him by persons at whose request and for whose accommodation the service was performed. He relied on the good faith of the Government to restore whatever belonged to him.

IV.

Your petitioner further avers that he turned into the Treasury a large sum, viz, about $1,000, on account of extra or quadruplicate copies of invoices, and for invoices for goods in transit through the United States.

V.

Your petitioner further says that his accounts have been settled, but that he received no credit for the sums of money so erroneously credited to the Treasury.

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VI.

Your petitioner prays that the facts relating to his claim may be investigated by this honorable court, and that judgment be given in his favor against the United States for the amount that may be found due to him.

VII.

Your petitioner further avers that he is the sole owner of the claims herein set forth; that no assignment of any interest in them has been

made, and that he is justly entitled to the relief herein claimed, and that the facts set forth in this petition are believed to be true.

THOS. B. VAN BUREN.
JNO. S. MOSBY,
Counsel for Petitioner.

Subscribed and sworn to before me this 23d day of March, 1888.

OGDEN HOFFMAN,
U. S. District Judge for Northern District California.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify that the Honorable Ogden Hoffman, whose name is subscribed to the preceding certificate, is the judge of the district court of the United States for the northern district of California, duly appointed and qualified, and that the signature of said judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 23d day of March, A. D. 1888.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. District Court, Northern District of California.
By J. S. MANLEY,
Deputy Clerk.

3 II. *Traverse, filed April 3, 1888.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

4 III. *Amendment to petition, filed May 5, 1890.*

The claimant moves the court to be allowed to amend petition by inserting after word "duty," in section second of said petition, as follows: "And for certifying to invoice declaration for goods in transit through the United States to foreign countries."

JOHN S. MOSBY,
Atty. for Claimant's Estate.

Allowed.

WM. A. RICHARDSON,
Chief Justice.

MAY 5, 1890.

IV. *Substitution of administrator, May 12, 1890.*

Edgar M. Wilson, having filed a duly authenticated copy of the record of his appointment as administrator of Thomas B. Van Buren, deceased, with will annexed, hereby moves the court that this cause be proceeded with in his, said Wilson's, name as administrator aforesaid.

JOHN S. MOSBY, *Atty., &c.*

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

MAY 12, 1890.

5 V. *Amendment to petition, filed March 27, 1894.*

The claimant moves the court to be allowed to amend his petition by adding after the word "and," in section four, the figures $4,322.50, so as to make the last portion of the sentence read, "and $4,322.50 for certifying invoices for goods in transit through the United States."

JOHN S. MOSBY,
Atty for Claimant.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

MARCH 27, 1894.

6 VI.

On the 15th day of June, 1896, the court ordered judgment to be entered in this cause in favor of the claimant, in the sum of four thousand three hundred and twenty-two dollars and fifty cents.

On the 11th day of August, 1896, the defendants filed their application for appeal.

On the 21st day of December, 1896, the court filed an order withdrawing former findings of fact, and thereupon filing new findings of fact and conclusion of law, nunc pro tunc as of June 15, 1896, and reaffirmed former judgment. The court also filed an opinion, to wit:

Opinion of the court.

DAVIS, J., delivered the opinion of the court:

While plaintiffs' intestate was consul-general in Japan, he certified invoices for goods intended at that time to be shipped through the United States to a foreign port. The fees for this service he would be entitled to retain as his personal emolument under the decision in Mosby's Case were nothing else developed as to the transaction. It appears, however, that some of the goods covered by these invoices were in fact stopped in transit while within the territorial jurisdiction of the United States, were entered for consumption within the United States, and did not in fact leave the United States. There is no intimation of any fraud, collusion, or bad faith in any of the transactions, nor is there reason to suspect either. The shipper, when he procured the certificates to the invoices,

intended that the goods should go beyond the United States. The certification, therefore, was an unofficial act, and the fee was the personal emolument of the consul-general. This court so decided in Mosby's Case, saying:

"The third item of charge in claim is for certifying invoices for goods in transit through the United States to other countries, $5,805.

"This amount was collected by claimant during the time he officiated as consul at Hongkong, and was paid into the Treasury. For the purpose of avoiding delay and annoyance the shippers of goods through the United States procured from the consul what is called 'transit invoices.' They are not the invoices referred to in the sections of the statute above quoted, but such invoices as accompanied goods in transit through the United States. The law did not require the consul to issue such certificates, and hence no provision was made for them either in the regulations of 1874 or 1881. Nor do the regulations of the Treasury Department require the consuls to perform any duty in relation to such goods." (Gen. Reg. Treas. Dept., 1884, p. 361; Mosby v. United States, 34 C. Cls. R., 13.)

7 The Supreme Court affirmed this court, saying—

"The item of $5,805, which was allowed, is covered by finding 9, and is for fees received for certificates of shipment of merchandise in transit through the United States to other countries. These were not the invoices referred to in sections 2853 and 2855 of the Revised Statutes, either as they originally stood or as they were amended by the act of June 10, 1880. The law did not require the consul to issue those certificates; no provision was made for a fee for them in the regulations of 1874, or in those of 1881; and it does not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. This item was, therefore, properly allowed." (United States v. Mosby, 133 U. S. R., 285.)

There, therefore, is left for us but one point, viz, Was the character of the consul-general's fee determined by the facts existing at the time he performed the service and did he then become entitled to the fee, or was his right to the fee to be determined only after the goods had reached a final destination somewhere at some indefinite time and after an undetermined delay—that is, was the consul-general bound to follow these goods until they were actually consumed in Havana, Buenos Ayres, London, or St. Petersburg, or were his rights determined and his responsibilities ended when in good faith he certified the invoices and received his pay?

The statement of the proposition seems to us to carry its answer. When the invoices were certified, it was intended that the goods should go beyond the United States. That being so, the certification was unnecessary in law, the fee was unofficial, and the consul-general might retain it. The transaction was then complete and ended. Later we reach a new transaction absolutely disconnected from the first one; to this transaction the consul-general was not a party, and of it he had no knowledge. The owners of the goods stopped them in transit, and presumably paid the duties if there were any due. This was a transaction absolutely independent of the previous consular act performed in Japan, and could not revert to that act to change its character.

When the consul charged this fee, he was entitled to retain it, and the subsequent change of the shippers' plans should not retroact to divest him of his title to the fee. The defendants might by statute or regulation have required the shipper to pay as a condition to entry for consumption in the United States a fee equal to the consular fee for certifying the invoices, and thus have adequately protected themselves.

Former judgment affirmed.

VII. *Order of the court, filed January 18, 1897.*

It is ordered that the findings of fact and conclusion of law filed herein under date of December 21, 1896, be vacated and set aside, and that the findings of fact and conclusion of law now filed be filed nunc pro tunc as of June 15, 1896, the date of the original judgment herein.

BY THE COURT.

8 VIII. *Findings of fact and conclusion of law, filed as of June 15, 1896.*

This case having been reheard by the Court of Claims on defendant's motion, the court, upon the evidence and after argument of counsel on both sides, find the fact as follows:

I.

Thomas B. Van Buren, a citizen of the United States, was appointed consul-general of the United States at the port of Yokohama, Japan, and held office from June, 1874, until June, 1885.

May 7, 1885, Van Buren left Japan for the United States, and from May 8, 1885, to June 30, 1885 (both dates included), George E. Rice was in direct charge of the consulate-general, he being the vice consul-general.

II.

The claims presented in the petition for fees "for certifying invoices of goods exported to the United States which were free of duty," and for certifying "extra or quadruplicate copies of invoices," have been abandoned by the claimant, under the decision of the Supreme Court of the United States in the case of United States v. Mosby (133 U. S., 273).

III.

During his term of office Van Buren, while at Yokohama, and (during his absence on leave) the vice consul-general, received fees for certifying invoices of merchandise (at the rate of $2.50 for each invoice) shipped from said port of Yokohama in transit through the United States in bond to foreign countries, amounting to the sum of four thousand one hundred and fifteen dollars ($4,115), which fees were paid into the Treasury of the United States, under the rules, regulations, and requirements of the Departments of State and of the Treasury requiring fees to be so accounted for and paid to the United States.

The number of these invoices was 1,646. These invoices followed forms 138 or 139 of the Consular Regulations, except that after the word "America" in the last paragraphs of said forms the words "in transit for" were added, following which came the name of some foreign country which was to be reached by crossing the United States.

Of the merchandise so shipped that covered by 523 of said invoices was stopped in transit and entered for consumption in the United States without further consular certificate, and the declarations or invoices and certificates as hereinbefore described were accepted by the customs officers of the United States as sufficient. The fees collected for certifying these 523 invoices amounted to $1,307.50.

9 IV.

Van Buren's accounts for the fees hereinbefore described were settled at the Treasury Department, and in the settlement he was charged with said fees as for official fees.

It is not shown that the reason for paying said fees into the Treasury was to avoid a controversy with any Department of the Government, or that Van Buren made any demand to have the fees refunded to him or credited to him before said accounts were finally settled, or that before the final settlements of said accounts at the Treasury Department he made any objection or protest against said fees being charged to him as official fees.

V.

The merchandise described in 478 of said 1,646 invoices passed in transit through the United States to foreign countries and was exported from the United States. The fees collected for certifying these invoices amounted to $1,195.

As to 645 of said 1,646 invoices, it is not shown either that the merchandise described in the invoices was stopped in transit and entered for consumption in the United States, or that it passed in transit through the United States to a foreign country. The fees collected for certifying these invoices amounted to $1,612.50.

VI.

During his term of office, to wit, after March 31, 1881, and before May 7, 1885, the claimant's testator charged and collected fees at the rate of $2 each, certifying "quadruplicate or extra copies of invoices" of merchandise imported into and entered for consumption in the United States, no part of which sum has been accounted for or paid into the Treasury of the United States.

VII.

These fees were voluntarily paid by shippers, at whose solicitation the service was rendered, were collected in good faith, and credited by Van Buren to the Treasury.

Conclusion of law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment in the sum of four thousand one hundred and fifteen dollars ($4,115).

10 IX. *Judgment of the court.*

EDGAR M. WILSON, ADMINISTRATOR OF Thomas B. Van Buren, dec'd, *vs.* THE UNITED STATES. } No. 16090.

At a Court of Claims held in the city of Washington, on the 18th day of January, A. D. 1897, it was ordered that the former findings of fact and conclusion of law filed herein be withdrawn, and the judgment heretofore entered be vacated and set aside. The court thereupon filed findings of fact and conclusion of law nunc pro tunc as of June 15, 1896, and judgment was ordered to be entered nunc pro tunc as of that date, as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Edgar M. Wilson, as administrator of Thomas B. Van Buren, deceased, do have and recover of and from the United States the sum of four thousand one hundred and fifteen dollars ($4,115).

BY THE COURT.

11 X. *Application for and allowance of appeal.*

From the judgment rendered on January 18, 1897, in the above-entitled cause as of the 15th day of June, 1896, in favor of claimant, the defendants, by their Attorney-General, on the 18th day of January, 1897, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed January 18, 1897.

Mr. Assistant Attorney-General Dodge, for the defendants, presented in open court an application for the allowance of an appeal filed of this date, and it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

JANUARY 18, 1897.

12 In the Court of Claims.

EDGAR M. WILSON, ADMINISTRATOR OF Thomas B. Van Buren, dec'd, *vs.* THE UNITED STATES. } No. 16090.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, the opinion of the court, the judgment of the court, the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 25th day of January, A. D. 1897.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16479. Term No. 700. The United States, appellant, vs. Edgar M. Wilson, administrator of Thomas B. Van Buren, deceased. Court of Claims. Filed January 28, 1897.

APR 22 1897
JAMES H. McKENNEY,
CLERK

No. 700. 296.

Brief of Atty. Gen'l (Dodge & Brannigan) for Appt.

Filed April 22, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
EDGAR M. WILSON, ADMINISTRATOR of the estate of Thomas B. Van Buren, deceased, appellee. } No. 700.

BRIEF FOR APPELLANT.

JOSHUA ERIC DODGE,
Assistant Attorney-General.
FELIX BRANNIGAN,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
EDGAR M. WILSON, ADMINISTRATOR of Thomas B. Van Buren, deceased, appellee.
No. 700.

BRIEF FOR APPELLANT.

STATEMENT.

The claimant's decedent was consul-general for the United States at Kanagawa, Japan, from June, 1874, until June, 1885. Subsequent to March 31, 1881, he certified invoices of goods intended for entry into the United States by forms required by Revised Statutes, sections 2853 and 2855, except that in the form of invoices, declaration, and certificate, after the designation of the port in the United States at which the goods were to be entered, was added the words, "in transit for * * *," the blank in each case being filled with the name of some foreign country. (See forms, pp. 3–8, in record of Kennedy Case, heard herewith.) This

form of certificate and invoice being called transit invoice and being made because it was represented to the consul-general that they were intended, not for consumption in the United States, but for entry for transit through the United States to a foreign country.

The total number of these invoices was 1,646, for which he charged the statutory fee of $2.50 each.

The property covered by 478 of these invoices did, in fact, pass in transit through the United States and was exported to foreign countries, the fees collected for which by claimant were $1,195.

The property covered by 523 of these invoices was by virtue of the said certified invoices entered for consumption in the United States. The fees thereon were $1,307.50.

And as to the property covered by the remaining 645 invoices, it is not shown by the evidence whether it passed in transit and was exported from the United States, or whether it was entered for consumption therein. The fees collected for this class was $1,612.50.

At the time of the rendition of these services, the regulations under which claimant held his office declared the fees for certifying these so-called transit invoices to be official and required him to account therefor as official emoluments of his office. He, without protest or objection, did so account for said fees and made no objection to his liability to so account therefor until after his office had terminated and his accounts been closed.

The Court of Claims held that all of these fees, amounting to $4,115, were unofficial; that claimant was not required by law to account therefor as emoluments,

and that he was entitled to recover them back; and accordingly rendered judgment for that amount against the United States, from which this appeal is taken.

The findings made in the two cases to be argued together throw mutual light on each other—for example, it is found in this (the Wilson) case that these invoices, with the words "in transit for ———" included in them, were accepted by the customs officers as sufficient to satisfy the requirements of section 2860, which is of course, for they contain everything which that section requires. (Finding III.)

Again, in the findings in the Kennedy Case, some sample invoices, declarations, and certificates are set forth (Finding VI, pp. 3–8), which will be found to meet all the requirements of sections 2853–2855, with the additional words "in transit for ———," which, of course, are merely surplusage.

In the Kennedy Case it is also found (Finding VIII) as follows:

> The declarations and consular certificates on all of the transit invoices mentioned in this suit are in the form prescribed by the United States Consular Regulations for invoices of merchandise intended for entry and consumption in the United States. (See United States Consular Regulations of 1874, paragraph 477 and 466 and Appendix V of said regulations, Forms No. 139 and 140, on page 446).
>
> Consular certificates were not required by the practice of the Department for invoices of merchandise intended for transit through the United States. They were made by the claimant as consul at the request of the shippers, and for their accommodation and convenience.

ASSIGNMENTS OF ERROR.

I.

The court erred in allowing to the claimant in the judgment the sum of $1,307.50, collected by him as fees for certifying the said 523 invoices of goods which were entered for consumption in the United States.

II.

The court erred in allowing to the claimant in the judgment appealed from the sum of $1,612.50 collected and accounted for by him upon the said 645 invoices of goods as to which there was no evidence that they passed in transit through and were exported from the United States.

III.

The court erred in allowing to the claimant in the said judgment the sum of $1,195, the fees collected by him for certifying the said 478 invoices of goods, which in fact passed in transit through and were exported from the United States to some foreign country.

IV.

The court erred in allowing judgment to the claimant for the sum of $4,115, or any part thereof.

V.

The court erred in not rendering judgment in favor of the defendant and dismissing the petition.

ARGUMENT.

At the time of the transactions out of which this claim arises Revised Statutes, section 2860, provided:

> Except as allowed in the four preceding sections, no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of sections twenty-eight hundred and fifty-three, twenty-eight hundred and fifty-four, and twenty-eight hundred and fifty-five, and has thereon the certificate of the consul, vice-consul, or commercial agent in those sections specified, nor unless the invoice is verified at the time of making such entry by the oath of the owner or consignee, or of the authorized agent of the owner or consignee, certifying that the invoice and the declaration thereon are in all respects true and were made by the person by whom the same purports to have been made, nor unless the triplicate transmitted by the consul, vice-consul, or commercial agent to the collector has been received by him.

Consular Regulations promulgated September 1, 1874, provide for the official service of certifying invoices in compliance with section 2860, Revised Statutes, in paragraph 461 et seq., and the forms thereof are given at pages 446 and 447, being forms Nos. 138 or 139 for the declaration and No. 140 for the consular certificate. The same subject appears in Regulations of May 1, 1881, as paragraph 636 et seq., and the same forms are given with the same numbers at pages 581 and 582.

In the Consular Regulations of 1881, paragraph 640, it is provided that the—

> consular certificates are not required in connection with the entry of goods passing in transit through the United States to or from countries adjacent thereto under combined entry for transportation and exportation, such goods not being considered as ordinary importations.

This regulation did not exist prior to 1881, and does not therefore affect the bulk of the controversy here. In any event, however, it will be contended that it could not change the law as expressed in section 2860.

By section 1745, Revised Statutes, it is provided:

> The President is authorized to prescribe from time to time the rates or tariffs of fees to be charged for official services and to designate what shall be regarded as official services besides such as are expressly declared by law.

Official fees are defined in the Regulations of 1874, in paragraphs 321 et seq., the tariff being found in paragraph 333, in which the fee is $2.50 for certifying invoices according to Form No. 140. That fee, however, is also expressly prescribed by statute, section 2851, Revised Statutes. In the Regulations of 1881 the same subject is treated in paragraph 482 et seq. and the tariff prescribed in paragraph 496.

Paragraph 321 of the Consular Regulations of 1874 is as follows:

> All acts are to be regarded as "official services" when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States.

The Consular Regulations for 1884, paragraph 489, is as follows:

> All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein.

It will thus be seen that during the period from 1874 to 1881 the President had prescribed that all service shall be official when the consul is required to use his seal and title officially or either of them. That during that period he was required by sections 2853, 2854, 2855, and 2860 to use his official title and seal upon invoices of all goods to be imported into the United States, and during that period there was not even an attempt by regulation to except the case of goods which were to pass in transit.

It will also be observed that after May 1, 1881, when there was an attempt by regulation (par. 640) to dispense with the requirement of certified invoices for such goods, the official character of the fee was no longer made to depend merely on the question whether the service was required, but every fee prescribed in the tariff of fees was by paragraph 489 declared to be official, and that the fee for certifying invoices in the Form 140 was prescribed in the tariff.

The questions here presented are three:

First. In the light of the new evidence showing that the so-called transit certificates are the same certificates as required by sections 2853–2855, and the newly made

suggestion that such certificates are *required* by law and could not be dispensed with by the regulation, whether the fees here claimed for certifying invoices of goods which did in fact pass through the United States without being entered for consumption therein, can be treated as unofficial, as they were in the Mosby Case (133 U. S., 285).

Second. If the certification of invoices of goods which pass through the United States in transit can, by virtue of paragraph 640 of the Consular Regulations above quoted, or by reason of the practices of customs officers, be deemed unofficial, whether the certification of invoices of goods which do not so pass in transit through the United States, but are entered for consumption therein, can also be classed as unofficial because the consul, at the time of making the certificate, believed the goods were intended for transit, and, accordingly, put the words "for transit to ———" upon the invoices and upon his certificate.

Third, if certificates are official where goods do not pass in transit through but are entered for consumption in the United States, and are unofficial when they do so pass in transit and are exported from the United States, whether the burden of proof is not upon a consul to establish the exception to the law expressed in section 2860, claimed to be created by paragraph 640 of the Consular Regulations.

I.

In the Mosby Case, supra, neither the Court of Claims nor this court were given the benefit of any information as to what transit invoices were. The Court of Claims, speaking by Judge Weldon, said: "They are not the invoices referred to in the sections of the statute above

quoted, sections 2853 and 2855, but such invoices which accompany goods in transit through the United States." The Supreme Court, speaking by Mr. Justice Blatchford, adopted this statement and said, "These are not the invoices referred to in sections 2853 and 2855 of the Revised Statutes." It now appears by the evidence in the two cases before the court at present that they were the identical invoices described by those sections and which the law by section 2860 required should accompany "all merchandise imported from any foreign place or country" in order that they should be admitted "to an entry."

The error in fact is now corrected. Whatever may have been the invoices in the Mosby Case, it appears here that the invoices and certificate were those *required* by sections 2853 and 2855.

It also appears, from the briefs in the Mosby Case, that the attention of the court was not called to the fact that the service of the consul was *required by law*. It being so required by law, no power exists in the Secretary of State, or other head of a Department, to do away with that requirement by a regulation. (*Morrill* v. *Jones*, 106 U. S., 466.)

The coming of any merchandise into a port of the United States is, of course, an importation and an entry, whatever may be the ultimate purpose of its proprietor. It is imported, although it may never touch American soil, but be transferred from one vessel to another in the harbor.

Schooner Mary, 1 Gall., 206, 209.
United States v. *Vowell*, 5 Cr., 368.
Saltonstall v. *Russell*, 152 U. S., 628.
Seeberger v. *Schweyer*, 153 U. S., 609, 613.

II.

If, however, it shall be held that property imported into the United States for the purpose merely of transport and exportation is excepted from the plain language of section 2860, and that, therefore, there is no requirement that it shall be accompanied by a certified invoice, that exception can be due only to the regulation above quoted (par. 640), and that excepts only "goods passing in transit through the United States to or from countries adjacent thereto, under combined entry for transportation and exportation." There is no practice of the customs officers to dispense with the certified invoice under any other circumstances. If the goods do not pass in transit through the United States, then they do not fall within even that exception to the law, and the certified invoices provided for by sections 2853–2855 are required, and the invoices certified in this instance, and for which the fees were collected, were accepted and recognized as complying with those requirements, which they obviously did.

The suggestion in the opinion that the customs officers, as a condition of admitting these goods to entry, could have required a payment into the Treasury of $2.50 on each invoice by the importer, seems to me erroneous. The law gave the importer a right to enter these goods upon production of certified invoices in compliance with sections 2853–2855. These invoices did so comply, and the Secretary of the Treasury could not by a regulation

deprive the importer of his right to enter them upon payment of the duty prescribed by law.

Morrill v. *Jones* supra.
Merritt v. *Welsh*, 104 U. S., 694.

The good faith of the parties in this instance may be beyond question, but the practical result is the same as if there had been a skillfully devised scheme between the consul and the importer to defraud the Treasury of a part of its revenue. The goods have been imported into the country, and that has been accomplished by means of a consular act which the law requires, and yet the fees prescribed both by statute and by regulation for that act are, on claimant's contention, to be withheld from the Treasury. A construction of the law which invites such collusion and such practical frauds is not to be readily adopted.

That the rule established by the Mosby Case was effective in suggesting and promoting such collusion with some consuls is pretty well established by the rapid increase in the quantity of goods thereafter imported under certified invoices containing the "in transit for ———" clause. The decision in that case was rendered by the Court of Claims in December, 1888, and affirmed by this court in December, 1890, and on July 17, 1891, the Secretary of State, in a public consular circular, said:

> An investigation made by the First Comptroller of the Treasury reveals the fact that a majority of the shipments in transit under consular invoice are entered for consumption on arrival in the United

> States and never pass on to the alleged foreign destination. This discovery leads to the belief that the obtaining of a consular invoice for goods shipped ostensibly in transit through the United States to some other country is prima facie evidence of an intent to dispose of the goods in the United States if it be found on arrival there to be advantageous to do so.

There is presented here no case of persuasive equity as where an officer has taken and held his office and performed services with the understanding, induced by rulings and practice of his superiors, that he was to have the fruits thereof as his own. Through all the time of this claimant's service he perfectly well understood that all this class of fees belonged to the United States; he took this office with that understanding; he certified each invoice in accordance therewith, and he paid over those fees without the suggestion of a doubt that they belonged in the Treasury and not to him. If he is to recover them it must be because strict law gives them to him, and not because he has fairly earned them upon the understanding had both by himself and his superiors at the time of rendering the service.

III.

If claimant can contend that by virtue of Regulations, paragraph 640, the certified invoices of goods which, in fact, passed in transit through the United States have become unofficial by being excepted from the law requiring them for all importations, it seems clear that the burden rests on him to prove the exception. The fact

of their entry into the country under any circumstances brings them within the provisions of section 2860 and makes the certified invoice a thing required by law. If for any reason a benefit is to be gained by an individual by reason of these particular shipments being excepted from the law, the facts creating such exceptions should be proved by the person claiming it. This he has wholly failed to do as to the 645 invoices mentioned in the second assignment of error. We only know that they were by virtue of the certified invoices imported into this country. Whether they passed out again is wholly unproved.

IV.

This case differs from the Mosby Case in that it was found as a fact that Mosby paid over the fees for which he sued, under protest, and with notice of his claim that they belonged to him, by reason of the insistence of superior officers that they belonged to the Government, and that his payment was for the purpose of avoiding a controversy with the Department. In the case at bar the finding is that the payments were made wholly without objection and without suggesting any claim that they were not official.

This marks the difference between a voluntary and an involuntary payment.

The right of one to recover back money paid to another who is not rightfully entitled thereto and can not in equity and good conscience retain it, is an exceptional one and closely watched, and only arises out of two classes of

transactions; first, where the party, although he pays it voluntarily and without objection, does so under a mistake of fact; and secondly, where, knowing the facts and knowing or suspecting the law, he makes protest and only pays under compulsion or duress, which the other party, by reason of his position, is able to exercise over either the person or property of the payer.

The two classes are perfectly distinct, and a given transaction must belong exclusively to one or the other, and being located, only confusion results from an attempt to examine into the existence of those elements which are material only to transactions of the other class.

If the claim here falls wholly within the first class, namely, that of a payment entirely voluntary, without thought or knowledge of any unlawfulness of the demand, it is entirely immaterial that he did not protest, and also immaterial whether the party receiving the money was in a position to coerce by reason of being a superior. Protest and coercion are both impossible accompaniments of a payment voluntarily made by one who believes he ought to make it.

Apparently the transaction here presented to the court falls within this first class, of a payment made voluntary, which, if mistaken at all, was mistaken only as to the law. If, however, it is sought to bring it within another class, namely, where claimant, knowing his rights and objecting to the payment, is compelled by superior force to make it, the essential element of protest—or, at least, notice of the objections to the legality of the demand on him—is lacking. I freely conceded that subordination

of the party making the payment to a superior officer constitutes the duress sufficient in law to make a payment involuntary, but there must also be that other element commonly called protest, for it is an act of bad faith to pay money which one believes he ought not to pay and intends to attempt to reclaim without notifying the party so receiving it of that intention.

The idea suggested sometimes of peril to a subordinate officer from such an objection has no support in fact. No public officer ever suffered from the courteous statement of his belief in his legal rights. The Mosby Case is a confirmation of this assertion. No penalty fell on him, although he notified the officers both of the State and of the Treasury Department of his contention in a somewhat vigorous manner.

I respectfully urge that the practice ought not to be sanctioned by judicial decision that all public officers may at any time within the statute of limitations bring their suit to recover back moneys which have been paid into the public treasury and the payment of which has served as a basis for the finances of the country although they failed to make any objection whatever to the payment or to suggest their belief in their right to withhold it.

It is respectfully submitted that the judgment should be reversed.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

JAMES H. McKENNEY,
CLE

No. 296.

Brief of Mosby for Appellee.

In the Supreme Court of the United States.

Filed Oct. 15, 1897.

THE UNITED STATES, Appellant,
vs.
WILSON, Administrator of VAN BUREN, Appellee.

No. ~~[illegible]~~ 296

Brief for Appellee.

STATEMENT.

The Court of Claims rendered judgment *nunc pro tunc*, as of June 15, 1896, in favor of appellee on account of fees for consular certificates to invoices of goods shipped from Japan *in transit* through the United States, which were paid into the Treasury. The Court finds that the fees were, in good faith, collected by the Consul; that the number of transit invoices certified by him was 1646, for which a fee of $2.50 was charged, this being the statutory fee for certifying an official invoice for goods imported, for consumption, into the United States. The goods described in 478 invoices passed through the United States; those described in 523 of said invoices were stopped in transit and entered for consumption in the United States; those in 645 invoices are not shown to have passed either into, or through, the United States.

ARGUMENT.

I.

The judgment was rendered in conformity with *United States* v. *Mosby*, 133 U. S., p. 285, affirmed in *United States* v. *Greathouse*, 166 U. S., p. 601. Greathouse was Van Buren's successor in office. Van Buren was Consul-General in Japan when Mosby was Consul at Hong-Kong, and, of course, they were both governed by the same law and regulations.

In Mosby's case no inquiry was made as to what the shipper did with the goods after the invoices were certified, because it was considered immaterial. A Consul has no control over the goods

described in an invoice. The finding that the service was performed in good faith is repugnant to the suggestion of collusion between the shipper and the Consul; the fee charged being the same as the statutory fee for an official invoice, the shipper got no benefit from its being unofficial; nor could any fraud have been meditated, as it was turned into the Treasury. It is not true, as stated in appellant's brief, that when these services were performed, the regulations declared that they were official. In this case the rights of the Consul are determined by the law as construed in the cases of Mosby and Greathouse, *supra*. In Mosby's case the Court said:— "These [transit invoices] were not the invoices referred to in Secs. 2853 and 2855 of the Revised Statutes, either as they originally stood, or as they were amended by the Act of June 10, 1880. *The law did not require the Consul to issue these certificates;* no provision was made for a fee for them in the regulations of 1874, or in those of 1881; *and it does not appear that the regulations of the Treasury Department required a Consul to perform any duty in relation to such goods.*" The regulations of 1874 and of 1881 were those in force while Van Buren was in Japan.

II.

If a shipper had used the same *form* for an unofficial invoice as that prescribed for an official copy, it would not have affected the substance of the transaction. Its official or unofficial character would have depended upon the essential question whether the shipper declared the goods to be destined for consumption in the United States, or simply to be in transit through the United States. As to goods in transit the Court said in Mosby's case: "The law did not require the Consul to issue these certificates." The finding, however, is, that the same forms were *not* used, but " the words ' in transit ' were added, following which come the name of some foreign country which was to be reached by crossing the United States." The invoice on its face, therefore, gave notice to the Collector of its unofficial character and the original destination of the goods. This made collusion between shipper and Consul impossible, if the Collector did his duty. Section 2857, Revised Statutes, authorizes a Collector to require a consignee to give bond to produce an official invoice before the goods are delivered to him. The consignee could notify the shipper to furnish the Collector an official invoice, and thus discharge the bond. This would save the fee to the Treasury, while the Consul would retain his; he cannot be deprived of it by the delinquency of a Collector. It is easy for the Treasury

Department to instruct Collectors, in such cases, to require a bond to produce an official invoice. That would prevent fraud and collusion between shippers and Consuls. It has no right to require a Consul to show that the goods have actually passed through the United States to their final destination.

III.

The stoppage *in transitu* and delivery of the goods to a consignee in the United States can have no retrospective operation on the rights of a Consul for compensation for unofficial services. If unofficial when performed, they could not become official by an *ex post facto* change of destination. He had a vested interest in the fee, not a contingent right dependent upon the caprice of the shipper. If the fee was unofficial when the service was rendered, nothing the shipper could do afterward could alter its character. The instant it was rendered, the fee belonged to the Consul, and it was not in the power of a shipper, by changing his mind, to take it away. The right was immutably fixed by the conditions existing when the act was done. The Consul had no control over the shipment of the merchandize. The change in the destination of the goods could not change the rights of the Consul, and divest him of what he had earned. As to 645 invoices, it is not shown either that the goods passed in transit through, or into, the United States. As this Court decided in Mosby's case that the fees for transit invoices were the personal perquisites of a Consul because "no law or regulation required a Consul to perform any duty in regard to such goods;" *a fortiori* he was not required to perform any duty in regard to goods that never entered the territory of the United States; consequently, the service was unofficial, and the fee personal. So far as the Consul's rights are concerned, it is immaterial what became of the goods after the invoice was certified. They may have been destroyed.

V.

The doctrine that money paid under mistake of law cannot be recovered applies only to cases when parties stand "on equal terms," *Swift Co.* v. *United States*, 111 U. S. A subordinate officer and the department to which he is subject are not on equal terms. Undue influence is presumed when he surrenders his legal rights from the relation of dominion on one side and submission on the other. If parties are on equal terms, no protest will save a right voluntarily

relinquished; if on unequal terms, no protest is necessary, except in cases where a protest is required by statute; as in the payment of duties as a condition of the right to recover them back. In the cases of *United States* v. *Lawson* and *United States* v. *Ellsworth*, 101 U. S. 169-173, the fees were paid into the Treasury *without claim or protest.* The Court said: " * * * Call it mistake of law, or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

It is respectfully submitted that the judgment below be affirmed.

JNO. S. MOSBY,
For Appellee.

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The Court of Claims in this case gave judgment in favor of the appellee upon these facts: Thomas B. Van Buren, a citizen of the United States, was appointed consul-general of the United States at the port of Yokohama, Japan, and held office from June, 1874, until June, 1885. While at Yokohama, Mr. Van Buren received fees for certifying invoices of merchandise shipped from that port through the United States in bond to foreign countries amounting to the sum of $4115, which fees were paid into the Treasury of the United States under the rules, regulations and requirements of the Departments of State and Treasury, requiring fees to be so accounted for and paid to the United States. There were 1646 of these invoices. Of the merchandise so shipped, that covered by 523 of the invoices was stopped in transit, for consumption in the United States without further consular certificates, and the declarations or invoices and certificates made by the consul were accepted by the customs officers of the United States as sufficient. The fees collected for certifying these 523 invoices amounted to $1307.50. The merchandise described in 478 of the 1646 invoices passed in transit through the United States to foreign countries, and was exported from the United States. The fees collected for certifying these invoices amounted to $1195. With regard to 645 of the 1646 invoices, there was no evidence either that the merchandise described in the invoices was stopped in transit and entered for consumption in the United States, or that it passed in transit through the United States to foreign countries. The fees collected for certifying these invoices amounted to $1612.50. Mr. Van Buren's accounts for the total of all these among other fees were settled at the Treasury Department, and in the settlements he was charged with these as for official fees.

The Court of Claims found that it was not shown that the reason for paying said fees into the Treasury was to avoid controversy with any department of the Government, or that Mr. Van Buren made any demand to have the fees refunded to him, or credited to him before said accounts were finally set-

tled, or that before the final settlement of his accounts at the Treasury Department he made any objection or protest against said fees being charged to him as official fees. The court gave the claimant judgment for the total of the three sums above mentioned, being $4115.

The judgment in this case was mainly based by the court below upon the case of *United States* v. *Mosby*, 133 U. S. 273, and it was there held that the invoices referred to in sections 2853 and 2855, Revised Statutes, either as they stood originally, or as they were amended by the act of June 10, 1880, did not include invoices for the shipment of merchandise in transit through the United States to other countries, and that the law did not require a consul to issue certificates in such cases; that no provision was made for a fee for them in the regulations of 1874, or those of 1881, and that it did not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. The claim of the claimant in regard to such fees was allowed as a proper claim against the Government.

It is stated in the brief of counsel for the Government herein that in the *Mosby case* neither the Court of Claims nor this court was given the benefit of any information as to what transit invoices were, and it is now said that both the courts were mistaken in holding that the invoices in the *Mosby case* were not those referred to in the above-numbered sections of the Revised Statutes; and it is said that it now appears by the evidence before the court that such invoices are the identical invoices described by those sections, and that section 2860, in providing that, "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of sections 2853, 2854 and 2855, and has thereon the certificate of a consul, vice-consul or commercial agent in those sections specified," makes it necessary to have the consular certificate given in this case.

We are not now called upon to question the decision in the *Mosby case*. We think there is another ground upon which to base a reversal of the judgment herein, which is, that the

payments made by Mr. Van Buren of the fees covered by his claim were wholly voluntary, and that the general rule applicable to voluntary payments should be enforced.

The petition in this case was not filed until the 30th of March, 1888, and Mr. Van Buren's term of service expired in June, 1885. From the commencement of that service in 1874 up to the termination of his office and the final settlement of his accounts, no whisper of any claim on his part against the Government was ever heard from Mr. Van Buren. It does not appear that he had the least doubt that the Government was entitled to all the fees paid over by him to it, and in all the various settlements of his accounts with the Treasury Department, and in his correspondence, so far as this record shows, no claim was ever made or hint given on his part that he had the least title to retain these fees or to recover them back if paid to the Government. There is no pretence that he paid the fees into the Treasury to avoid a controversy with any department of the Government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so finds in substance. If a voluntary payment can be made to the Government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the Government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the Government, without claim of any right to retain one penny of it.

In *United States* v. *Lawson*, 101 U. S. 164, the collector received an order in writing from the commissioner of customs, his superior, requiring him to account for all fees received by him as collector. Under that order he paid the fees in controversy into the Treasury, and it was held that

having thus paid them pursuant to a peremptory order of his superior officer, he was not precluded from thereafter recovering them in a suit against the United States.

To the same effect is *United States* v. *Ellsworth*, 101 U. S. 170, where the ruling in the *Lawson case* is followed. In the *Ellsworth case* the court said, after referring to the penalties for non-compliance with the requirements of the law in paying over moneys: "Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

In both of the cases, in addition to the general law upon the subject of moneys received for the use of the United States to be paid into the Treasury, there was a distinct and peremptory order that the moneys in question should be paid, and it was in compliance with such order from a superior officer that the moneys were paid.

In *Swift Company* v. *United States*, 111 U. S. 22, the payments were held to be not voluntary because the purchaser of the stamps from the Government had to take them on the terms which the Government imposed or else go out of business. In that case, however, it appeared that the leading manufacturers of matches, among whom was William H. Swift, (who upon the organization of the claimant corporation in 1870 became one of its large stockholders and treasurer,) had made repeated protests to the officers of the Internal Revenue Bureau against the methods adopted by it in computing commissions for proprietary stamps sold to those who furnished their own dies and designs. It appeared that the rule of the department was one adhered to during the whole time of its existence, and it was announced by the Internal Revenue Commissioner that such ruling would not be altered, and as it was necessary for those in the business to have the stamps in order to continue their business, it was held by this

court that they were not obliged to continuously protest, and that settlements made with the Treasury officials upon the basis of the correctness of the custom of the department in regard to the sale of stamps and commissions thereon did not bar the claimant's right to recover the moneys which the department ought to have paid but did not; that the position of the parties was such as to render these continuous protests unnecessary. Various cases are cited by Mr. Justice Matthews, in delivering the opinion of the court, showing what amounts to an involuntary payment.

In the *Mosby case*, *supra*, it appears that the claimant asserted his right to the moneys and had correspondence with the officers of the department in relation thereto, and only paid the moneys to avoid a contest with his superior officers.

Nothing in any case cited is inconsistent with the view that the payments in this case were wholly voluntary in their nature, and as such cannot be recovered back.

For these reasons, without considering other questions appearing in the record, we think the judgment below should be

Reversed, and the case remanded to the Court of Claims with instructions to dismiss the petition.

UNITED STATES *v.* WILSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 296. Submitted October 26, 1897. — Decided November 29, 1897.

When a consul of the United States, in his regular accounts and settlements with the Treasury, charges himself with fees received by him as consul for which he is not obliged to account, and pays the same into the Treasury with each settlement, and retires, and makes his final settlement with the Treasury on the same basis, he cannot, in an action commenced in the Court of Claims three years after his retirement, recover back such payments, but they will be regarded as wholly voluntary payments.

THE case is stated in the opinion.

Mr. Attorney General and *Mr. Felix Brannigan* for appellant.

Mr. John S. Mosby for appellee.